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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 316

ALLIED CHEMICAL CORPORATION,

Petitioner,

—against—

HAMPTON ROADS CARRIERS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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HAMPTON ROADS CARRIERS, INC.,

Respondent.

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Petitoner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit (R. Vol. III, p. 15) is reported at 329 F. 2d 387; the denial of a petition for rehearing by the Court of Appeals (R. Vol. III, p. 48) is not officially reported. The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division (R. Vol. I, p. 197) is reported at 211 FS 940; 1963 AMC 763.

Jurisdiction

The decree sought to be reviewed is dated and was entered on March 16, 1964. The petition for rehearing was denied on April 23, 1964. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254(1).

Questions Presented for Review

1. When a charter party excuses the carrier from liability for the loss of cargo resulting from deficiencies of hull which cannot be discovered by the exercise of due diligence, and the deficiency which causes the loss is not established, can the carrier nevertheless be exonerated on a general showing of the steps taken to make the vessel seaworthy for the voyage.

2. If it has the burden of explanation, must the private carrier bring the loss within an exception of the charter, or can it escape liability on a showing that the loss was not due to unseaworthiness.

3. When a private carrier is required by the charter party to issue a bill of lading in a specified form when requested, does the burden of establishing the cause of loss fall on cargo merely because no bill of lading was issued.

Statement of Facts

This was a claim filed in a limitation proceeding. The District Court had jurisdiction under 28 U. S. Code, Sec. 1333 (1).

On May 22, 1958, petitioner and respondent entered into a written charter for transportation of sodium sulphate from North Claymont, Delaware to Jacksonville, Florida, by a barge and towboat to be furnished by respondent. (R. Vol. I, p. 15 through 23) Respondent warranted that it would exercise due diligence before and at commencement of the voyage to make the vessel seaworthy, properly manned, equipped and supplied for the voyage. (R. Vol. I, p. 16) The charter granted respondent extensive exceptions from liability for loss of cargo including loss due to unseaworthiness not resulting from lack of due diligence. (R. Vol. I, p. 19 through 21) The charter required respondent on request to issue a bill of lading on a form incorporated therein. (R. Vol. I, p. 21. The form of bill of lading is not included here but will be submitted as part of the record in the event certiorari is granted.)

On November 8, 1958, the Barge "BA 1401" having aboard 1400 tons of salt cake (sodium sulphate), sailed from North Claymont in tow of the Tug "Falcon" bound for Jacksonville, Florida. (R. Vol. I, p. 179) The voyage was uneventful until noon on November 11, 1958 when a passing tug reported that the barge seemed to be down by the stern. (R. Vol. I, p. 62) The flotilla was then crossing the mouth of the Potomac and the waters were calm. (R. Vol. I, p. 61, 63) The crew of the "Falcon" considered that

the trim of the barge was unchanged, but about one half hour later her stern went under water, she dumped her cargo over the port side and remained afloat at the bow for a time before disappearing. (R. Vol. I, p. 185, 186)

After several unsuccessful attempts, the barge was raised. Surveyors found that she had various fractures and indentations and a defective weld at the aft end under her No. 4 tank. (R. Vol. I, p. 145, 146) A surveyor representing cargo could not "pinpoint" the cause of the sinking, but suggested several possible causes including the defective weld which he testified would have been obvious if observed from within the tank. (R. Vol. I, p. 144, 145, 150) A naval architect engaged by cargo testified that the barge could not sink by the stern unless both No. 4 and the after-peak tanks were filled with water. (R. Vol. I, p. 103)

The trial judge found that the sinking resulted from the defective weld and a defective bulkhead between the No. 4 and after-peak tanks and that due diligence had not been exercised.

The Court of Appeals held that the finding of unseaworthiness was clearly wrong, and that "at the minimum the facts were evenly balanced on this issue." In either event the carrier was held excused as the court held that the burden of establishing unseaworthiness was on cargo as respondent was not a common carrier.

Moreover, the court held that even if some undetermined unseaworthiness caused the loss, the carrier escapes liability by showing general diligence even though the element of unseaworthiness which caused the loss is unknown.

Reasons for Granting the Writ

A—As substantial tonnages of cargo move in private carriage, the question whether cargo or carrier must explain the loss is crucial where the cause of loss is in doubt.

B—The holding by the Court of Appeals for the Fourth Circuit that the burden of explanation is on cargo in all cases of private carriage is in conflict with decisions of this Court.

We submit that the Court of Appeals was not justified in holding the trial judge was clearly wrong in finding that the barge sank by reason of a defective weld and bulkhead. Moreover, the court did not apply the standard of *McAllister* v. *United States*, 348 U.S. 19 (1954), as it conceded that "at the minimum the facts were evenly balanced on this issue." Even accepting these alternative findings, we submit that the court erred under the applicable decisions of this Court in excusing the carrier. The basis for the error is the holding that, as respondent was not a common carrier, the burden of establishing the cause of loss is on cargo.

This Court first considered this issue in the *Edwin I. Morrison*, 153 U.S. 199 (1894), where it was held that the burden of proof is on the private carrier. *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104 (1941), held in a 5 to 4 decision that the rule does not apply to transportation within a harbor. The minority view was that the controversies involved therein and in *The Edwin I. Morrison* were "distinguishable in no significant respect"

and it was urged that the burden should always be on the carrier. (*Commercial Molasses Corp.* v. *New York Tank Barge Corp., supra,* p. 116). The majority distinguished *The Edwin I. Morrison, supra,* as it deemed that the carrier had there assumed an obligation to carry safely, having issued a bill of lading. (*Commercial Molasses Corp.* v. *New York Tank Barge Corp., supra,* p. 113). The same obligation to carry safely is implicit here as the charter required the carrier to issue a bill of lading on request calling for delivery at destination in like order and condition as when shipped. That a bill of lading was not issued is of no consequence. The usual bill of lading would govern the rights of the parties. *Luckenbach S.S. Co., Inc.* v. *American Mills Co.,* 24 F2d 704 (5C A. 1928) For this reason and the fact that we are not concerned with harbor transportation, *The Edwin I. Morrison, supra,* is controlling here and requires that the carrier sustain the burden of proof. As *Commercial Molasses Corp.* v. *New York Tank Barge Corp., supra,* discusses at length private carriers who have the burden of proof and those who do not, we submit that the Court of Appeals' citation of that decision as holding that only common carriers must prove seaworthiness is in error.

The view that the burden of proof was on the carrier is supported on another ground. In *The Southwark,* 191 U.S. 1 (1903), this Court held that a carrier who is subject to the Harter Act must establish seaworthiness. This decision was approved in *Commercial Molasses Corp.* v. *New York Tank Barge Corp., supra,* at p. 109. If the Harter Act, or substantially similar provisions are incorporated in a

charter, the rules of interpretation applicable to that Act apply to the terms of the charter. *Metropolitan Coal Co.* v. *Howard*, 155 F 2d 780, 783 (2CA, 1946) As the charter here grants the carrier essentially the same exceptions from liability as those afforded a common carrier by the Harter Act, the burden of proof must be the same and hence on the carrier.

C—If the carrier must explain the loss, it does not escape liability unless the loss is brought within an exception of the charter party. It is not sufficient as the Court of Appeals for the Fourth Circuit held, that the loss was not due to unseaworthiness, or that issue is in doubt.

If we are correct that the burden of proof was on the carrier, it follows that the carrier is liable whether there was no evidence of unseaworthiness, or the evidence was evenly divided on that issue as the Court of Appeals found. If the latter alternative is true, then the question remains whether it still is possible for the carrier to establish the exercise of due diligence to make the vessel seaworthy and thereby to escape liability. We submit that the affirmative answer by the Court of Appeals to this question is in error and we shall discuss the reasons later.

Basically the carrier is liable because it breached the contract of carriage by failing to deliver the cargo at destination, and it can escape liability only if it can bring the loss within one of the exceptions provided in the charter party. "* * * the law casts upon him the burden of the loss which he cannot explain, or, explaining, bring within the exceptional case in which he is relieved from liability." *Schnell* v. *The*

Vallescura, 293 U.S. 296, 304, which applies to private carriers having the burden of proof. *Commercial Molasses Corp. v. New York Tank Barge Corp., supra*, 109.

If it had established that the cause of loss was not unseaworthiness, it would not have brought the loss within any exception from liability for breach of the contract of carriage. To achieve that result, the cause of loss must be affirmatively established and the Court of Appeals seems not to have made a finding of the actual cause, being satisfied that the burden of explanation was on cargo. We note that the court did mention that the suddenness of the sinking suggests that the cargo shifted, but this was only conjecture and not plausible as the vessel was sailing in calm waters and could not have exerted the force necessary to bring about a substantial shift of cargo aft. If this was intended to explain the sinking, the loss would not thereby necessarily fall within an exception. It seems clear in any event that the Court exonerated the carrier on the ground that the burden of proof was on cargo for in concluding that cargo was not liable on a counterclaim brought by the carrier for loss of the barge, the Court held: "Here, again, decision must be rested on the place of the burden of proof, as the cause of the disaster cannot be known exactly." (App. 27) We submit that in exonerating the carrier merely because it found that the loss was not due to unseaworthiness, the Court of Appeals was in error and in conflict with the decision of this court in *Schnell v. The Vallescura, supra*, as the cause of loss remains unexplained and the burden of explanation was on the carrier.

D—If the cause of loss is unseaworthiness, but the nature of that unseaworthiness has not been determined, the carrier cannot establish that due diligence was exercised. The holding of the Court of Appeals for the Fourth Circuit to the contrary is in conflict with the decisions of this court.

After holding that cargo had failed to sustain the burden of establishing that the loss was due to unseaworthiness, the Court of Appeals went on to consider the hypothetical question whether, if the evidence had disclosed unseaworthiness, the carrier would escape liability on the ground that it had exercised due diligence to make the vessel seaworthy at and prior to the start of the voyage. It considered this question without setting out the precise nature of the unseaworthiness and there is no indication it considered the definition thereof of significance. After reviewing various surveys and repairs which had been made, it concluded that "the evidence fails to show Barge neglectful in looking to the vessel's seaworthiness."

We submit that a carrier cannot establish due diligence without first establishing the exact means whereby the cargo became damaged or lost. If water damages cargo, the carrier must show how the water entered the vessel. If the vessel was lost, the reason therefor must be established. Once the defect is known, the carrier may then seek to show why the defect could not have been discovered by the exercise of due diligence prior to the sailing of the vessel.

We submit that the reasoning of the Court of Appeals that a carrier may escape liability for un-

explained seaworthiness by showing efforts to ascertain the fitness of the vessel for the voyage, is in conflict with the decision of this court in *Schnell* v. *The Vallescura, supra.*

Conclusion

A Writ of Certiorari should be granted in accordance with the prayer of this petition.

Dated New York, N.Y. July 21, 1964

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Opinion of District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Admiralty 8024

In the Matter of

Petition of SOUTHERN TRANSPORTATION COMPANY, INCORPORATED, as Owner of the tug "FALCON", for exoneration from or limitation of liability.

Admiralty 8029

In the Matter of

Petition of HAMPTON ROADS CARRIERS, INC., as Charterer and or Contract Purchaser of barge "BA-1401", for exoneration from or limitation of liability.

MEMORANDUM, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On November 11, 1958, the barge BA-1401 laden with 1411 tons of sodium sulphate, sometimes referred to as salt cake, sank in the Chesapeake Bay near the mouth of the Potomac River. At the time and place in question the barge was in tow of the tug

Falcon, the latter being owned by the petitioner Southern Transportation Company, Incorporated. As a result of the sinking the cargo was lost and the barge became a constructive total loss.

The petitioner, Hampton Roads Carriers, Inc., was a contract purchaser of the barge BA-1401 and, for the purpose of this proceeding, may be considered as an owner *pro hac vice*.

The principal controversy lies between the barge owner, Hampton Roads Carriers, Inc., and the cargo claimant, Allied Chemical Corporation. The evidence is insufficient to establish any fault on the part of the tug Falcon and, therefore, Southern Transportation Company, Incorporated, is entitled to a decree exonerating it from liability. As the barge sank under sea and wind conditions which were not unusual, the carrier is presumptively at fault unless the barge was improperly loaded by the owner of the cargo. With these preliminary remarks the Court makes the following

Findings of Fact

1. The petitioner, Hampton Roads Carriers, Inc., hereinafter called "Carriers," signed a charter party with Allied Chemical and Dye Corporation, now Allied Chemical Corporation, hereinafter referred to as "Allied," dated May 22, 1958, at a time when Carriers did not own a cargo barge or towboat with which to transport cargo.

2. The charter party stated, *inter alia*, that the vessel scheduled for such charter was a cargo barge

and suitable towboat, scheduled to load at North Claymont, Delaware, for voyages to Jacksonville, Florida, laden with minimum cargoes of sodium sulphate of 1200 net tons per trip, to be carried at a stated rate, and the owner (Carriers) warranted to exercise due diligence to make the cargo barge and towboat seaworthy before and at the commencement of each voyage. Under the charter party Carriers did not expressly agree to furnish a seaworthy vessel; its obligation being limited to the exercise of due diligence in the premises. There was no agreement between Allied and Southern Transporation Company.

3. During August, 1958, Carriers, acting through Batchelder, its principal officer, purchased in New Orleans an eight year old, steel, open hopper barge, 195 feet long, 35 feet in width, and 11 feet deep, known as BA-1401. It was constructed by Avondale Marine Ways, Westwego, Louisiana, in 1950. The barge was of welded steel construction with a flat bottom, straight sides, and raked bow and stern. It was a single open hopper with raked ends, and towing skegs were fitted port and starboard at the after end. The construction contemplated a watertight compartment between the hopper enclosure and the shell of the barge. This empty space, completely surrounding the hopper enclosure, was divided into six supposedly watertight compartments by the installation of athwartship watertight bulkheads between the hopper enclosure and the shell of the barge at regularly spaced intervals from bow to stern. Access to the void spaces between the hopper enclosure and the shell of the barge was through manholes for each

compartment from the main deck. A coaming, extending above the main deck level around the perimeter of the hopper enclosure, brought the hopper above the main deck.

4. When purchased at New Orleans, the barge was afloat and on dry dock. She was inspected afloat by Batchelder of Carriers and by one Jack Faulkner. She was also inspected by representatives of the United States Salvage Association for the purpose of a "trip-in-tow" from New Orleans to Jacksonville and for insurance purposes in providing hull coverage at that time. Faulkner is a barge and tow broker who also does some survey work. He did not testify and, from all appearances, there is every indication that he acted as a broker at the time of sale, and as agent for Carriers at the time of the aforesaid inspection, the report being dated September 11, 1958. The qualifications of Faulkner as a marine surveyor are unknown. As a result of this inspection certain recommendations were made and later found to be satisfactorily carried out. The United States Salvage Association inspection was expressly limited to the "trip-in-tow" from New Orleans to Jacksonville, as evidenced by the fact that the tug Pinta was similarly inspected as the towing vessel, and neither the tug nor barge could enter the Gulf of Mexico unless weather conditions were first approved by a representative of the United States Salvage Association. As a further condition, the inspection report states that it is not to be used in connection with the purchase of any vessel.

5. Carriers, acting through Batchelder, relied upon the inspection report from United States Salvage Association, dated September 11, 1958, in purchasing the barge known as BA-1401 for the sum of $40,000.00 Underwriters requiring the inspection provided full hull insurance coverage in the amount of $45,000.00. On September 6, 1958, the Coast Guard issued a certificate of inspection authorizing the barge, *in light condition*, to navigate outside waters from Carrabelle, Florida, to Fort Myers, Florida. The extent of the inspection by representatives of the United States Salvage Association is not established by the evidence and we have only the aforesaid report to consider as of that time.

6. Following repairs made at New Orleans pursuant to the aforesaid inspection report, the barge was taken light to Norfolk, Virginia, where a survey was held on September 30, 1958, at the request of cargo underwriters to determine the barge's general condition and suitability to transport a cargo of salt cake. Once again, we only have the benefit of the report as neither party elected to call the resident surveyor who was readily available. This inspection was attended by Batchelder, as well as the two surveyors representing Allied. The gist of this report is contained within the following conclusion:

> "As far as may be ascertained from a general examination of this barge afloat without removals or opening up to expose parts ordinarily concealed, and without taking borings to ascertain thickness of structural members, or testing for

tightness, it is the opinion of the undersigned that the hull and equipment will be in satisfactory condition for operation, if and when, the foregoing recommendations are completed as projected."

The recommendations were, according to the evidence, carried out.

7. The barge then proceeded to North Claymont, Delaware, for her initial cargo under the charter agreement. Allied expressed dissatisfaction with the tarpaulin and found that the barge had water in the hold. The water boiled up into the open hopper through a number of small holes and through one hole as large as a silver dollar. The barge was thereafter taken to the RTC Shipyard at Camden, New Jersey, but was not hauled out of the water and no condition survey was made. The supports for the tarpaulin were re-arranged and doublers were installed as suggested by the shipyard.

8. The barge was returned to North Claymont where she took on a cargo of 879 tons of sodium sulphate and carried the same safely to Jacksonville. On her return trip she left Jacksonville light and stopped at Brunswick, Georgia, where she picked up 900 tons of bale paper. The bales were loaded by a shifting crane, apparently by starting at one end and proceeding to the other, but leaving space on the bow and stern for 300 tons of roll paper at Savannah, Georgia, which cargo was thereafter loaded in the same manner. There were two minor groundings and she tied up at Allied's dock at noon on November 7.

1958. Other than the minor groundings mentioned above, the evidence does not reflect that the barge was underway at any time other than during moderate weather and sea conditions; the barge having been put into safe refuge in advance of heavy seas or other adverse conditions.

9. Allied commenced loading the barge for the the second trip at 4:40 P.M. on November 7 and completed this operation at 6 A.M. on November 8. In order to visualize the loading method adopted by Allied, the open hopper will be divided into four imaginary holds of equal size numbered from forward to aft as 1, 2, 3 and 4. The sequence of loading was 2, 1, 3 and 4. As the dock crane was in a fixed position, the barge was turned end for end after the #1 hold was loaded in order to load holds #3 and 4. Thus the barge would be essentially fully loaded at one end before being turned around to be fully loaded at the opposite end. The method and manner of loading and unloading the salt cake was the sole responsibility of Allied. Carriers' only obligation was to have the tug master check as to the security of the cargo covers put on by Allied and, during loading, to shift or rotate the barge as requested by Allied.

10. As a preliminary to loading the barge, Allied caused the salt cake to be transported in dump trucks from storage bins to a wooden pad at the end of the pier. A crane affixed to the pier took buckets of salt cake and swung them laterally to a position over the open hopper. After a pile had been loaded at the

imaginary #2 hold, the barge was shifted inshore and another pile was loaded into the imaginary #1 hold. After this process was completed the barge was turned end for end and the imaginary #3 and #4 holds were loaded in the order named. According to the log memorandum it appears that there was a final turning of the barge (in addition to an earlier turning at approximately 10 P. M.) at 4 A. M. for the purpose of putting four loads (about 11 tons each) thereon.

11. The total cargo loaded on November 7-8 was 1411 tons. Batchelder, who was present during a portion of the loading operations for the initial voyage, specifically stated that the barge was capable of carrying 1400 tons. In fact, he had complained about the small quantity carried on the initial voyage which was appreciably less than 1200 tons as agreed by the parties.

12. The barge departed North Claymont at 9:15 A. M. on November 8, 1958, in tow of the tug Falcon on a 50 foot hawser. The flotilla tied up at Tolchester Beach at 11:55 P.M. that night as the weather was getting rough. Remaining there until 6:30 A. M. on November 9, the flotilla proceeded out into the Chesapeake Bay where a 600 foot hawser was placed on the tow. That afternoon, shortly after 3 P. M., an adverse weather report caused the tug master to pull into the Patuxent River and anchor. Prior to entering the Patuxent River the winds were from 12 to 15 miles per hour, with waves of 2 to 3 feet measured from crest to valley. The tug and tow remained in Patuxent River until 7:15 A. M. on No-

vember 11, and then proceeded southerly on the voyage with the tow made up on the 600 feet of hawser with cable bridles. The flotilla passed Point No Point at 10:10 A. M. and entered the waters of the Potomac River a few minutes after noon with no unusual sea or wind conditions then prevaling.

13. At approximately 12:35 P.M. on November 11 it was reported that the barge appeared to be sinking. Only a few minutes prior thereto the trim of the barge appeared to be the same as when she left North Claymont. The tug attempted to pull the barge to shoal water but, after it became apparent that she was sinking and the hawser was cut, she rolled over from starboard to port, dumping her cargo and turning end for end. She finally refloated and rested on her port side; thereafter she began to sink by the stern and after a short period of time only about eight feet of the starboard bow remained above water. The towing hawser had been cut to protect the tug and crew just prior to the barge's capsizing. At about 10:30 P.M. the bow disappeared. The tug remained in the area until the arrival of the Coast Guard.

14. Following the disaster the barge was surveyed in her sunken condition in order to ascertain the nature and extent of damages and the propriety of salvage. Steps were taken to raise the barge on a "no cure—no pay" basis, subject to certain conditions not here pertinent. Salvage operations during early January, 1959, were unsuccessful. The barge was finally raised during the latter part of January. Some 15 or 20 efforts were made to raise the barge from

the bottom and, understandably, additional damage to the barge was occasioned during these operations.

15. The barge was finally surveyed on June 29, 30 and July 1, 1959, with the tug, barge and cargo interests represented. She was then on the marine railway at Old Dominion Shipyard at Norfolk. This damage survey revealed several fractures of the hull, indentations on the bottom, a severe fracture in the vicinity of the #4 tank and an extensive "dishing in" along the port side of the barge. The evidence supports the view that the fracture in the way of the #4 tank was caused by a defective weld which was not observable from the bottom of the barge but could have been noted visually from above. True, the specific time of the fracture was not susceptible of ascertainment. There was evidence of thin plating on the barge, doublers and sheared plug welds. The bottom of the barge revealed four heavy "arches", two each within the one-third length from either end, extending for nearly the full width, together with several fractures in the way of three of these arches. Carriers contends that these "arches" or transverse buckling were the result of improper loading by Allied thus causing undue longitudinal stresses.

16. Allied concedes that it cannot pinpoint the exact cause of sinking. It suggests that the sinking was caused by water entering the fracture in the way of the #4 tank and thereafter entering the after peak tank. There would have to be a defective bulkhead to permit water to enter the after peak tank and, while there is no affirmative evidence of such defective bulk-

head, it is not unlikely that this was the major cause of the sinking when all proper inferences from the testimony are considered.

17. Divers made an underwater inspection of the barge on November 12, 1958, but this report is inconclusive except for the condition of the port side of the barge. According to the divers' report "the entire portside was reported set in to a maximum depth of (2') feet between the main deck and the bottom of the barge." This is explained as being attributable to the overturning of the barge, with the barge collapsing on the outside due to the pressure of water underneath it and the pressure proceeding inward on the side of the hopper casing by reason of the additional load when the cargo shifted.

18. The experts are in substantial agreement that the loading operations under the direction and control of Allied did not impose stress or strain conditions which reached the "yield point of metal;" this point being defined as the point at which metal will elongate or stretch or, if curved, at the point at which metal would not come back to its original shape. While petitioners' expert, Miller, did state that the stress analysis of the loading conditions reached a point at which it "could" be considered "serious" and "could eventually" result in the sinking of the barge, such evidence, together with other testimony, is insufficient to establish that Allied improperly loaded the barge or otherwise conducted loading operations in an improper manner. All calculations point to the fact that the metal was not stressed to the "elastic limit," i.e., the point to which one can go without a fracture.

19. The existence of doublers in the form of plates welded on top of other plating for reinforcement, or over a weak area, creates a condition that will normally arouse the suspicions of a competent surveyor that the plating is thin and this fact, on an average purchase survey, would give rise to a closer inspection than is ordinarily made on a trip-in-tow survey, damage survey, or a survey merely for insurance purposes. The Court finds that, in the language of a competent marine surveyor, a more comprehensive examination is made for the purpose of the purchase of the vessel than when the vessel is surveyed for a trip-in-tow or for hull insurance.

20. The barge BA-1401 was in fact unseaworthy at the commencement of her voyage from North Claymont, Delaware, on November 8, 1958, and Carriers, in relying upon the two surveys previously made, failed to exercise due diligence to make the barge seaworthy.

21. The cargo was a total loss. It was owned by Allied Chemical Corporation, formerly Allied Chemical and Dye Corporation, and was worth $48,466.34 according to Allied's invoice to St. Regis Paper Company. If any adjustment is to be made by reason of freight charges, the same may be revised in the final decree.

CONCLUSIONS OF LAW

(a) The petitioner, Carriers, is liable for the resulting loss of cargo. A decree must follow unless petitioner is entitled to limit liability and, on this issue, the burden rests upon Carriers. *Metropolitan Coal Co.* v. *Howard*, 2 Cir., 155 F. (2d) 780, 783; Gilmore & Black, *The Law of Admiralty*, p. 695, et seq.

(b) While the petitioner is not chargeable with "privity or knowledge" or with "design or neglect" when it has used due diligence to furnish a seaworthy barge, the petitioner in this case failed in its duty in that it relied upon surveys which were for limited purposes and which facts were known, or should have been known, to the petitioner. *The Abbazia*, 127 Fed. 495; *Frederick Snare Corp.* v. *Moran Towing & Transp. Co.* 195 F. Supp. 639. The diligence required is diligence with respect to the vessel, not in obtaining certificates of seaworthiness from surveyors. *Bank Line* v. *Porter*, 4 Cir., 25 F. (2d) 843, 845.

(c) If there is doubt as to the seaworthiness of the barge, that doubt must be resolved against the owner of the barge and in favor of the shipper. *The Southwark*, 191 U.S. 1, 24 S. Ct. 1, 48 L. Ed. 65; *Bank Line* v. *Porter*, supra.

(d) There is no evidence as to the prior history of the barge before its purchase at New Orleans other than the date and place of construction; nor is there

evidence that the petitioner endeavored to secure such history before purchasing the barge.

(e) Fault of the tug Falcon has not been established and the petitioner, Southern Transportation Company, Inc., is entitled to a decree exonerating it from liability.

(f) No improper loading of the barge having been established by credible evidence, the counterclaim of Carriers must fail.

(g) The case of *Commercial Molasses Corporation v. New York Tank Barge Corporation*, 314 U.S. 104, 62 S. Ct. 156, while containing sound principles of law as to the presumptions and burdens in an unexplained sinking of a barge, is not controlling under the facts of the instant case. The inferences to be drawn from this record properly suggest that the barge BA-1401 was unseaworthy.

(h) Allied Chemical Corporation is entitled to a decree against the petitioner, Hampton Roads Carriers, Inc., in the sum of $48,466.34, plus interest and taxable costs, subject to adjustment, if any, for freight charges.

(Sgd) WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
January 2, 1963

Opinion of Court of Appeals

Filed March 16, 1964

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9131.

HAMPTON ROADS CARRIERS, INC.,

Appellant,

versus

ALLIED CHEMICAL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued November 12, 1963. Decided March 16, 1964.)

Before BRYAN and BELL, Circuit Judges, and CRAVEN, District Judge.

R. Arthur Jett, Jr., and R. Arthur Jett (Jett, Sykes and Berkley, and Smathers and Thompson on brief) for Appellant, and Francis N. Crenshaw and R. M. Hughes, III, (James H. Simonson, and Baird, Crenshaw & Ware; Seawell, McCoy, Winston & Dalton, and Bigham, Englar, Jones & Houston on brief) for Appellee.

Opinion of Court of Appeals

ALBERT V. BRYAN, Circuit Judge:

Foundering of barge BA-1401 in Chesapeake Bay, with total loss of her lading of some 1400 tons of sodium sulphate (salt cake) was attributed by the District Judge to unseaworthiness. On this finding he decreed damages against her owner,[1] appellant Hampton Roads Carriers, Inc., (Barge), in favor of appellee Allied Chemical Corporation, cargo owner and charterer of the barge (Cargo). Consistently, he dismissed the barge owner's petition for exoneration or limitation of liability,[2] the proceeding in which Cargo's claim was pressed. At the same time Barge's counterclaim upon Cargo for improperly loading and so causing the constructive loss of the barge—necessary repairs exceeding her restored value—was denied.

We must set aside the award against Barge. The ultimate factual inference of unseaworthiness is not sustained by the subsidiary findings, but even if existent the fault was excused under the terms of the charter party by Barge's diligence in seeing to her seaworthiness. Decision on the counterclaim is affirmed as a finding not clearly erroneous.

The contract of affreightment, dated May 22, 1958, covered a cargo barge and suitable towboat for transportation of salt cake from North Claymont, Delaware to Jacksonville, Florida. Tug Falcon and barge BA-1401 were furnished for the purpose by Barge. As the tug, owned by another party, was exonerated of

[1] Actually a contract-purchaser

[2] 46 U.S.C. 183 (1958).

all blame, she will not be considered in our discussion of Barge and Cargo liabilities. The pivotal stipulation of the voyage agreement was this:

> "25. General Exceptions Clause: (A) The Vessels employed herein, the respective master and Owner shall not * * * be responsible for any loss or delay arising or resulting from . . . *unseaworthiness* of the Vessel or Vessels whether existing at the beginning of the voyage or developing during the voyage *unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy.* . . ." (Accent added.)

The BA-1401, built in Louisiana in 1950 and acquired by Barge in September 1958 at New Orleans, was constructed of welded steel, with flat bottom and straight sides, and raked at both ends. Her dimensions were: length 195'; breadth 35'; depth 11'. A hopper, serving as a cargo hold, was 140.5' long, 29' wide, and 8.5' deep. The hull was divided into 10 separate watertight compartments, consisting of 4 wing tanks on each side and one tank each in the forward and afterpeak.

When purchased she was afloat. In the transaction Barge was represented by its president, Batchelder, and Jack Faulkner, a shipbroker devoting some time to marine surveys. Both examined the barge. United States Salvage Association was engaged to inspect her for hull insurance on a trip in tow from New Orleans to Jacksonville. This inspection, made both in the water and drydock, was attended by Faulkner as

Barge's representative. The report was that the barge had been inspected "in all of its parts as far as permissible without making removals to expose parts normally concealed and the hull found in apparent satisfactory condition. In the opinion of the surveyors in preparing the vessel for the proposed trip in tow . . . every precaution, to the extent that its design, dimensions and fittings permitted has been taken to put it in such condition as to safely endure the weather and sea conditions normally to be expected on the voyage." Certain work recommended by the inspectors was completed before the trip was undertaken. Usual conditions were also included to the effect that the report should not be used in connection with the purchase, hiring or freighting of the vessel.

Since the Jacksonville journey would entail deviation from the inland waterways at points in Florida, an inspection by the Coast Guard to authorize the outside passage was required.[3] Its approval was obtained in a certificate dated September 6, 1958. Traveling light, the barge reached Jacksonville without concern, whence she was towed via the Inland Waterway to Norfolk, Virginia. A survey of the barge was made there for Cargo and its cargo insurers to ascertain the condition of the barge and its suitability to move a lading of salt cake. Following this she was taken to North Claymont, and later to a Camden, New Jersey shipyard, where the hopper was repaired to satisfy certain conditions pointed out by

[3] United States Revised Statute § 4421 (1873-74), now incorporated in 46 U.S.C. 399.

Cargo. Under the charter party the barge then carried 879 tons of salt cake to Jacksonville, quite uneventfully. On her return she picked up approximately 1200 tons of roll paper at Georgia ports and delivered it to Paulsboro, New Jersey and Chester, Pennsylvania, without significant misfortune.

On November 7th about 4:40 o'clock P. M. loading of salt cake was commenced for her second and fateful trip south. Next morning, November 8th, with 1411 tons stowed in the hopper she was drawn by the Falcon down Chesapeake Bay until rough weather was met at 11:55 P. M. She tied up at Tolchester Beach for the night, resuming travel at 6:30 A. M., November 9th. An unfavorable afternoon weather forecast caused the flotilla to seek shelter in the Patuxent River until the early morning of November 11th. Passing the mouth of the Potomac River near noon that day, the master of the Falcon in observing sternwards saw his tow apparently shipshape, following well on a 600-foot cable. In a short while, however, towboat Condor bound upstream spoke the Falcon to warn her that the barge was sharply down by the stern. The Falcon answered that the cargo had been trimmed with a slight stern drag to the barge for easier handling. Within 20 or 30 minutes Falcon's tugman shouted that the barge was settling fast.

At once the captain tried to beach her or at least shoal her water, but as she did not respond, the towing hawser was cut. The BA-1401 started down sternforemost, heeled to port and momentarily stood on her

beam-ends. Though not capsizing she careened steeply to dump her cargo. Immediately the barge righted, but with only a few feet above water at the starboard bow. She filled and sank at 10 o'clock that night.

The next day a diver examing the barge on the Bay bottom observed severe damage along the entire port side of the hull, including a deep longitudinal indentation. She was not raised until June 1959. Meanwhile she had been brought up 15 or 20 times, slipping back in each instance. Finally in June 1959, salvage operations succeeded; she was taken to Norfolk and hauled on the railway. All interests appeared for the survey.

Hull fractures were visible in several places. One, 12 feet long, was at No. 4 tank which is adjacent to the afterpeak tank. This fracture extended athwartships along a weld now said to have been inadequately made. The edges of two hull plates there had been welded without first making a v-separation between them, with the wide end of the "v" facing the exterior of the hull, so as to provide a larger area on which the weld could take hold. A surveyor, who testified as to his examination after the sinking, said the criticized weld was not discernible upon looking at the bottom of the hull from below but was observable from above —apparently meaning from within the No. 4 tank. Other damage included several transverse arches or bucklings in the centre one-third of the hull bottom.

1. "The test of unseaworthiness", it was said in The Silvia, 171 U. S. 462 (1898), "is whether the vessel is reasonably fit to carry the cargo which she has under-

taken to transport". The Southwark, 191 U.S. 1, 9 (1903); Bank Line v. Porter, 25 F.2d 843 (4 Cir.), *cert. denied*, 278 U.S. 623 (1928). The sinking of the barge in fair weather and smooth water was the point at which the trial judge quite correctly commenced, for that fact prima facie proved unseaworthiness.

More specifically, he adverted to the fracture near No. 4 tank. As the barge initially immerged at the stern, he reasoned that the Bay waters had first been admitted into this tank at the fracture, and thence made into the afterpeak tank through some defect in the bulkhead between them. This was the opinion advanced at the trial by an expert witness reconstructing the cause of the accident three years afterwards. Under his theory the barge would have remained afloat despite the flooding of No. 4 tank, so that only ingress of the water from No. 4 into the aftermost tank would have sunk her. The Court concluded "it is not unlikely that this was the major cause of the sinking when the proper inferences from the testimony are considered". However, as both parties conceded, there is no evidence whatsoever to establish that the hull fracture occurred before the foundering of the barge. On the second hypothesis the Court stated: "[T]here is no affirmative evidence of such defective bulkhead".

That the weld did not fail "as a result of fracturing under stress, or . . . from simple corrosion" was the opinion of engineer and surveyor Pillatt. He was employed by Cargo to inspect the barge, soon after she

was raised and hauled, "to ascertain the nature and extent, as well as possible causes of damages". He testified that the weld showed poor workmanship, but "no definite cause of the sinking could be determined". Six possibilities were listed by him, including this fracture and improper or overloading. In a report dated January 6, 1959, surveyor Jaeger, who had been employed as Cargo's representative at the last pre-loss inspection of the barge, indicated that she was "overloaded at the time of the casualty". This, too, was the report of surveyor Eirich, Barge's witness. Both repeated this opinion after recapture of the barge.

The evidence makes it quite manifest, too, that this fracture and any injury to the bulkhead could have been the result of the ship's wrenching in distress. Other fractures noted in the hull were accepted as caused by this violence. As she writhed in her attempt to jettison the salt cake, to resist the clutches of the Bay, obviously she must have undergone tremendous stresses and strains upon her seams. The convulsions evidently shifted the 1400-ton cargo, putting enormous pressures upon the entire structure of the barge. Additionally, the 15 or more attempts to bring her up, and her falling back each time to a depth of 42 feet, might well have inflicted serious damage to the hull.

Cargo's own surveyors at Norfolk on October 7, 1958 six weeks before her loss had reported on their inspection that the "barge was in a satisfactory state of preservation". Again, the barge's behavior

on the prior trips militates against the concept of unseaworthiness. At no time had she revealed weakness in any member. From the hour she left home port the second time until the moment she began to submerge there was not the slightest change in her trim. Soundings were taken regularly on this trip and in no tank was water found. The awful suddenness of the sinking, against this past experience, hardly suggests unseaworthiness. *Cf.* Peter Paul, Inc. v Rederi A B Pulp, 258 F.2d 901 (2 Cir. 1958), *cert. denied*, 359 U.S. 910 (1959). It points rather to a shift in the lading.

This chronicle of events and circumstances accords with the District Court's subsidiary findings. The only proof of infirmity in the vessel is the fact that she sank, plus the suggestion of the cause offered by the expert witness several years later as the rupture at No. 4 tank, assuming a leak in the bulkhead. Her history and the testimony of the surveyors—for Cargo as well as for Barge—upon inspection of the barge before the sinking and after she was raised refute the charge of unseaworthiness.

The District Court's determination of unseaworthiness from these factual premises we think was clearly not justified. At the minimum the facts were evenly balanced on the issue, a possibility the District Judge recognized. But he declared that any such "doubt must be resolved against the owner of the barge and in favor of the shipper". This too was error. Barge was not a common carrier and so Cargo had the burden to prove unseaworthiness. Commercial Molas-

ses Corporation v. New York Tank Barge Corporation, 314 U.S. 104, 110 (1941).

II. But had the evidence disclosed unseaworthiness, Cargo still could not recover. Under the charter party, as we have noted, only "want of due diligence on the part of the owner" can impose liability for unseaworthiness. Here the burden was upon Barge to prove itself requisitely diligent. Metropolitan Coal Co. v. Howard, 155 F.2d 780 (2 Cir. 1946). We think it acquitted itself.

Three surveys were made to find out if the barge had the strength and other qualifications to lift the salt cake. The earliest of these inspections was not more than 60 days before the loss of the barge, the last about 40 days. The first was to ascertain if Barge could get hull insurance before she left New Orleans for Florida. At that time Barge explained to the surveyor that it was depending on his report in making the purchase. She passed this test—in drydock as well as afloat—after complying with the inspector's directions for repairs. Later, the United States Coast Guard approved her for the run. Not conclusive of course, nevertheless these surveys are not to be discarded entirely in canvassing the attention exerted by Barge to discover deficiencies, especially in the hull. See Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 189 F.2d 488 (4 Cir. 1951); Frederick Snare Corp. v. Moran Towing & Transportation Co., 195 F. Supp. 639, 647 (1961).

Of special significance is the September inspection at Norfolk about six weeks before the mishap. It

was in effect a joint survey. Representing Cargo were its two chosen surveyors, whose competency is not challenged. One of these was the Jaeger already mentioned. Barge was represented too, apparently for the purpose of providing such repairs as might be shown by the survey to be needed. This, we think, evinced its diligence.

Jaeger's report was:

> "The barge generally was in a state of preservation and two (2) small fractures were noted at the time of the inspection and *pointed out to the owner's representative, who instituted repairs immediately.*"
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> * * * *
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> "As far as may be ascertained from a general examination of this barge afloat without removals or opening up to expose parts ordinarily concealed, and without taking borings to ascertain thickness of structural members, or testing for tightness, it is the opinion of the undersigned that the *hull* and equipment will be in satisfactory condition for operation, if and when, the foregoing recommendations are completed as projected." (Accent added.)

Surely, Cargo cannot now contend that Barge was lacking in diligence when it accepted the report and recommendations of Cargo's own selected surveyors. If Cargo wished to develop Jaeger's inspection as not thorough—merely to meet insurance requirements—Cargo had only to call him to the stand. He was a resident surveyor in Norfolk where the cause was

heard. Moreover, he was named in the pretrial memorandum as a witness Cargo intended to offer. As the representative of Cargo he could have detailed the manner of the inspection. Yet Cargo deliberately omitted to call him. With characteristic candor, its counsel tell us why: because he would say that the sinking was due to faulty loading.

This omission may have been advisable trial strategy—as the least hurtful—but it does not erase the adverse implication. His absence is damaging indeed. It implies that he would have testified to an inspection fulfilling the exactions of due diligence. O. F. Shearer & Sons v. Cincinnati Marine Service, 279 F.2d 68, 73 (6 Cir. 1960).

Before loading at North Claymont Cargo became worried about water in the hopper. Thereupon the barge was at once taken to a shipyard to find and correct any defect responsible for the water. All of this was done in association with Cargo. Barge's president stayed with her to "see that the job was satisfactorily completed." Two steel doublers were placed in the hopper to seal small holes through which the water had seemed to "boil up". These were to secure the hold, not the hull. When she was finally submitted to Cargo and pumped out "it was determined she was not leaking." These repairs and the condition of the hopper were approved by Cargo for a *dry* cargo.

This approval is conclusively established by the requirement of the charter that the charterer "prior

to loading, [must] inspect the holds of the vessel and refuse to load should the same be found unfit for the carriage of the cargo". Again, "[A]cceptance of the vessel by the Charterer or loading the cargo shall be a complete fulfillment of the Owner's obligation under this clause". Thus, on the last as well as the first shipment of salt cake, Cargo was in no position to assert defectiveness in the hopper.

Our view is, to repeat, that the evidence fails to show Barge neglectful in looking to the vessel's seaworthiness.

III. While the method of loading the barge may have been responsible for a fatal shifting of the lading and thus might well have accounted for the sinking, we are not persuaded that the District Court was clearly in error in concluding otherwise. Here, again, decision must be rested on the place of the burden of proof, as the cause of the disaster cannot be known exactly. It was Barge's obligation on the loading issue, and we cannot say the District Judge did not have ground for his determination of failure on the part of Barge in this regard.

The decree of the District Court will be reversed insofar as it holds Barge, Hampton Roads Carriers, answerable to Cargo, Allied Chemical Corporation, for the loss of the salt cake, but it will be affirmed in denying the counterclaim of Barge against Cargo. The suit will be remanded for the entry of a decree consistent with this opinion.

Affirmed in Part and Reversed in Part and Remanded.

Decree

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9131.

HAMPTON ROADS CARRIERS, INC.,
Appellant,

vs.

ALLIED CHEMICAL CORPORATION,
Appellee.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, reversed insofar as it holds Barge, Hampton Roads Carriers, answerable to Cargo, Allied Chemical Corporation, for the loss of the salt cake, and affirmed as to the denial of the counterclaim of Barge against Cargo; that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of

Virginia, at Norfolk, with directions that a decree be entered consistent with the opinion of the Court filed herein; and that the costs be divided equally between the parties.

ALBERT V. BRYAN
United States Circuit Judge

J. SPENCER BELL
United States Circuit Judge

J. B. CRAVEN, JR.
United States District Judge

FILED
Mar. 16, 1964

MAURICE S. DEAN
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9131.

HAMPTON ROADS CARRIERS, INC.,

Appellant,

v.

ALLIED CHEMICAL CORPORATION,

Appellee.

Upon consideration of the petition for rehearing filed in this case by the Allied Chemical Corporation, appellee, the Court is of the opinion that no ground has been shown therein for a rehearing, and, therefore, it is

ORDERED that said petition be, and it is, hereby denied and dismissed.

ALBERT V. BRYAN
United States Circuit Judge

J. SPENCER BELL
United States Circuit Judge

J. B. CRAVEN, JR.
United States District Judge

April 23rd, 1964.

FILED
Apr. 23, 1964

MAURICE S. DEAN
Clerk